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1 UNITED STATES PATENT AND TRADEMARK OFFICE

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4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES
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8 *Ex parte* DANIELA GIACCHETTI, GILLES RUBINSTENN,
9 and FRANCIS PRUCHE
10

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12 Appeal 2007-2841
13 Application 10/024,620
14 Technology Center 3600
15

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17 Decided: April 7, 2008
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20 Before MURRIEL E. CRAWFORD, LINDA E. HORNER, and
21 ANTON W. FETTING, *Administrative Patent Judges*.
22 FETTING, *Administrative Patent Judge*.

23 DECISION ON APPEAL

24 STATEMENT OF CASE

25 Daniela Giacchetti, Gilles Rubinstenn, and Francis Pruche (Appellants) seek
26 review under 35 U.S.C. § 134 of a final rejection of claims 1-48, the only claims
27 pending in the application on appeal.

28 We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b) (2002).

1 We AFFIRM.

2 The Appellants invented a way of providing beauty analysis and guidance in
3 response to information about a subject's characteristics through a series of
4 queries. The subject participates in an interactive beauty analysis with a virtual
5 beauty consultant presented to the subject visually and/or audibly, who may query
6 the subject. Information reflective of responses may be incorporated into
7 subsequent queries. The virtual consultant also may provide beauty guidance to
8 the subject based on the responses to queries (Specification 3-4:¶'s 007-008).

9 An understanding of the invention can be derived from a reading of exemplary
10 claim 1, which is reproduced below [bracketed matter and some paragraphing
11 added].

- 12 1. An electronic beauty analysis method, comprising:
13 [1] maintaining beauty information in a data structure;
14 [2] receiving personal information about a subject;
15 [3] selecting for presentation to the subject at least some beauty
16 information maintained in the data structure based on the received
17 information;
18 [4] presenting to the subject an image of a virtual beauty consultant;
19 and
20 [5] causing the image of the consultant to present to the subject the
21 beauty information selected for presentation.

22
23 This appeal arises from the Examiner's Final Rejection, mailed December 1,
24 2004. The Appellants filed an Appeal Brief in support of the appeal on October 3,
25 2005. An Examiner's Answer to the Appeal Brief was mailed on February 1,
26 2007.

PRIOR ART

The Examiner relies upon the following prior art:

Rosenblatt	US 2002/0007276 A1	Jan. 17, 2002
Maloney	WO 01/18674 A2	Mar. 15, 2001

REJECTION

Claims 1-48 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney and Rosenblatt.

ISSUES

The issue pertinent to this appeal is whether the Appellants have sustained their burden of showing that the Examiner erred in rejecting claims 1-48 under 35 U.S.C. § 103(a) as unpatentable over Maloney and Rosenblatt. The pertinent issue turns on whether Maloney and Rosenblatt would render the claimed virtual beauty consultant obvious.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Maloney

01. Maloney is directed to providing a customized product combination to a consumer. It collects profiling data about a consumer, determines a category, and provides the consumer with a list of one or more products that correspond to the consumer profiling category. A product choice selected from the list is received from the consumer. The consumer is

1 provided a customized product which corresponds to the consumer
2 profiling data and the selected product choice (Maloney 3:Fourth ¶).

3 02. Maloney obtains psychological and physiological information of a
4 consumer and creates a personalized profile from the attitudinal and
5 physiological information with a customized user interface
6 corresponding to the personalized profile of the consumer. The interface
7 correlates the psychological and physiological information of the
8 consumer. Maloney provides the consumer with a list of interaction
9 options which correlate to the personalized profile of the consumer. The
10 consumer chooses an option and is surveyed for further feedback data
11 used to modify the personalized profile and the customized user
12 interface (Maloney 3:Fifth ¶).

13 03. Maloney's invention responds to women's preference to choose
14 beauty care products on a one-to-one (in person, with the assistance of
15 an experienced consultant) basis. Information on color shade, oiliness
16 and other physiological properties of the skin and hair are vital to
17 providing an effective cosmetic facial product. In addition, certain
18 environmental conditions can affect the performance of the products.
19 On the other hand, some women prefer to purchase their beauty care
20 products without the assistance of others. For example, the consumer
21 may be embarrassed to discuss with another person available product
22 options which may overcome a specific physiological condition or
23 concern of the consumer. At the same time, the consumer desires a level
24 of customer service which is tailored to her preferences and purchasing
25 feedback. Prior to Maloney, there was a limited ability for a consumer

1 to shop for customized beauty products on her own and with
2 individualized guidance (Maloney 2:First and second full ¶'s).

3 04. Maloney's user interface may provide audio interaction and response,
4 with the consumer interacting with the user interface through a
5 microphone and speakers (Maloney 20:Last ¶).

6 05. Maloney may display an image of the consumer. The consumer can
7 make product selections and the virtual results are displayed on the
8 image of the consumer to depict how the products will look on the
9 consumer to help define the consumer's preferred look. The consumer
10 alters the image to produce the desired look and then is provided with a
11 list of products which should achieve the desired look (Maloney 20:Last
12 ¶).

13 06. After a customized product has been provided to the consumer,
14 feedback data is requested from the consumer via voice communication,
15 direct mail, electronic mail and additional web pages requesting
16 feedback on the web site. The feedback data is processed by a neural
17 network, which suggests changes to the consumer profiling algorithms
18 and customized user interface (Maloney 22:Second full ¶).

1 *Rosenblatt*

2 07. Rosenblatt is directed to photo-realistic, three-dimensional computer
3 animations, also referred to as "virtual representatives," in a variety of
4 business and communications settings (Rosenblatt ¶ 0007).

5 08. These settings include customer-support applications for web retailers
6 or service providers, as well as interpersonal email and chat. The use of
7 a standard architecture for these virtual representatives and to animate
8 them enables the customization of the representatives according to the
9 needs or desires of individual users and the deployment of their use for a
10 variety of business and interpersonal communications applications
11 (Rosenblatt ¶ 0007).

12 09. Rosenblatt applies its virtual representatives to traditional forms of
13 customer support for Web-based retailers including Frequently Asked
14 Questions (FAQs), detailed instructions, and indexed and searchable
15 help databases (Rosenblatt ¶ 0005). Such FAQs and help databases are
16 data structures that store queries and responses to typical user questions.

17 10. Various levels of control over the appearance and performance of the
18 virtual representatives may be implemented. For instance, a user may
19 choose one of a selected set of standard virtual representatives, and
20 incorporate certain standard expressions into text to be voiced by the
21 selected virtual representative (Rosenblatt ¶ 0008).

22 11. Rosenblatt's authoring module may include recorded voice and key-
23 framed data for animating the virtual representative on a frame-by-frame
24 basis or voice and meta-data for animating the virtual representative,
25 where the meta-data contains commands such as "happy" which then

1 gets translated into a happy looking face at the appropriate time
2 (Rosenblatt ¶ 0015).

3 12. In order to generate virtual representatives having realistic response
4 characteristics, a computer model of a performer's face is created using
5 an optical scanning system. Still photographs are then used to acquire
6 various textures. A "performance" is then acquired using a data motion
7 capture system in real time, followed by video digitization and tracking
8 analysis using the modeling techniques described above. A series of
9 node coordinates are then generated that track material features as they
10 move in time. This results in acquiring even the most subtle change in
11 facial geometry as the performer goes through a series of motions and
12 expressions (Rosenblatt ¶ 0040).

13 13. Rosenblatt provides a standard platform for using three-dimensional,
14 photo-realistic virtual representatives for use as guides, corporate
15 spokespersons, teachers, entertainers, game characters, personal avatars,
16 advertising personalities, and individual sales help. Applications for
17 these virtual representatives include email, Web pages, instant
18 messaging, chatrooms, training, product support, human resources,
19 supply chain software, ISPs, ASPs, distance learning, bill presentment,
20 and PC gaming, among others (Rosenblatt ¶ 0041).

21 14. Rosenblatt shows an image of a computer screen with multiple virtual
22 people present on the same screen interacting through facemail
23 (Rosenblatt Fig. 1).

1 *Facts Related To The Level Of Skill In The Art*

2 15. Neither the Examiner nor the Appellants has addressed the level of
3 ordinary skill in the pertinent arts of tracking items and data formatting.
4 We will therefore consider the cited prior art as representative of the
5 level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d
6 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific findings on the
7 level of skill in the art does not give rise to reversible error ‘where the
8 prior art itself reflects an appropriate level and a need for testimony is
9 not shown’”) (quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*,
10 755 F.2d 158, 163 (Fed. Cir. 1985)).

11 *Facts Related To Secondary Considerations*

12 16. There is no evidence on record of secondary considerations of non-
13 obviousness for our consideration.

14 PRINCIPLES OF LAW

15 *Claim Construction*

16 During examination of a patent application, pending claims are given
17 their broadest reasonable construction consistent with the specification. *In*
18 *re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969); *In re Am. Acad. of Sci.*
19 *Tech Ctr.*, 367 F.3d 1359, 1369 (Fed. Cir. 2004).

20 Limitations appearing in the specification but not recited in the claim are not
21 read into the claim. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed.
22 Cir. 2003) (claims must be interpreted “in view of the specification” without
23 importing limitations from the specification into the claims unnecessarily)

1 Although a patent applicant is entitled to be his or her own lexicographer of
2 patent claim terms, in *ex parte* prosecution it must be within limits. *In re Corr*,
3 347 F.2d 578, 580 (CCPA 1965). The applicant must do so by placing such
4 definitions in the Specification with sufficient clarity to provide a person of
5 ordinary skill in the art with clear and precise notice of the meaning that is to be
6 construed. *See also In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994) (although
7 an inventor is free to define the specific terms used to describe the invention, this
8 must be done with reasonable clarity, deliberateness, and precision; where an
9 inventor chooses to give terms uncommon meanings, the inventor must set out any
10 uncommon definition in some manner within the patent disclosure so as to give
11 one of ordinary skill in the art notice of the change).

12 *Obviousness*

13 A claimed invention is unpatentable if the differences between it and the
14 prior art are “such that the subject matter as a whole would have been obvious at
15 the time the invention was made to a person having ordinary skill in the art.” 35
16 U.S.C. § 103(a) (2000); *KSR Int’l v. Teleflex Inc.*, 127 S.Ct. 1727 (2007); *Graham*
17 *v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

18 In *Graham*, the Court held that that the obviousness analysis is bottomed on
19 several basic factual inquiries: “[(1)] the scope and content of the prior art are to be
20 determined; [(2)] differences between the prior art and the claims at issue are to be
21 ascertained; and [(3)] the level of ordinary skill in the pertinent art resolved.” 383
22 U.S. at 17. *See also KSR Int’l v. Teleflex Inc.*, 127 S.Ct. at 1734. “The
23 combination of familiar elements according to known methods is likely to be
24 obvious when it does no more than yield predictable results.” *KSR*, at 1739.

25 “When a work is available in one field of endeavor, design incentives and
26 other market forces can prompt variations of it, either in the same field or a

different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *Id.* at 1740.

“For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *Id.*

“Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.* at 1742.

ANALYSIS

Claims 1-48 rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney and Rosenblatt.

Claims 1-14 and 16-19

The Appellants argue claims 1-14 and 16-19 as a group.

Accordingly, we select claim 1 as representative of the group.
37 C.F.R. § 41.37(c)(1)(vii) (2007).

The Examiner found that Maloney described all of the steps in claim 1 in providing beauty advice, but did not specifically apply them to a virtual beauty consultant. To overcome this deficiency, the Examiner found that Rosenblatt described virtual representatives and implicitly found that one of ordinary skill would have known that such a representative within Maloney’s beauty advice environment would have been a virtual beauty consultant, and concluded it would have been obvious to a person of ordinary skill in the art to have therefore applied Rosenblatt to Maloney (Answer 4-5).

1 The Appellants contend that both Maloney and Rosenblatt fail to describe a
2 virtual beauty consultant (Br. 13:Last ¶); that one of ordinary skill would not have
3 combined Maloney and Rosenblatt (Br. 14:Last ¶); that replacing Maloney's
4 customer image with Rosenblatt's personal representative would make Maloney
5 unsuitable (Br. 16:Last ¶); and that the Examiner failed to show motivation in the
6 references for combining the references (Br. 17:Second ¶).

7 We disagree. Rosenblatt is directed to photo-realistic, three-dimensional
8 computer animations, also referred to as "virtual representatives," in a variety of
9 business and communications settings [FF 07]. Rosenblatt provides virtual
10 representatives for use as guides, corporate spokespersons, teachers, entertainers,
11 personal avatars, and individual sales help [FF 13]. Maloney is directed to
12 providing sales assistance to customers in general [FF 01] and to beauty product
13 customers in particular by providing a level of customer service which is tailored
14 to the customer preferences and purchasing feedback [FF 03].

15 We find that Maloney's beauty products are a predictable species of
16 Rosenblatt's business and communications settings, and that a virtual beauty
17 consultant would be a predictable species of Rosenblatt's virtual teacher and sales
18 help representatives within Maloney's beauty care environment. The Appellants'
19 do not persuade us of error on the part of the Examiner because the Appellants
20 respond to the rejection by attacking the references separately, even though the
21 rejection is based on the combined teachings of the references. Non-obviousness
22 cannot be established by attacking the references individually when the rejection is
23 predicated upon a combination of prior art disclosures. *See In re Merck & Co.*
24 *Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

1 As to the arguments that the references are not combinable and there being no
2 motivation to combine, we find that Rosenblatt's taught rationale for its virtual
3 representatives for customer support [FF 09] would have suggested its application
4 to such specific customer support environments as Maloney's [FF 03]. We find
5 that the Appellants' argument that replacing Maloney's customer image with
6 Rosenblatt's personal representative would make Maloney unsuitable simply
7 presents us with a false choice, as no one, and certainly not one of ordinary skill,
8 would consider such a substitution. Rosenblatt's virtual representatives present
9 information to the customer. Such presentation of information to a beauty care
10 customer is described by Maloney. We find that one of ordinary skill would have
11 applied Rosenblatt's virtual representatives to Maloney's presentation of
12 information, which would be consistent with Maloney's operation.

13 *Claim 15*

14 Claim 15 requires causing a pre-recorded image of an actual human being to be
15 displayed to the subject. The Examiner found that Maloney described the added
16 limitations (Answer 7). The Appellants repeat their contentions from claim 1,
17 which we find equally unpersuasive here, and further contend that Rosenblatt's
18 creating geometry for an image does not constitute causing a pre-recorded image
19 of an actual human being to be displayed (Br. 20:Top ¶¶).

20 We disagree. Rosenblatt uses photo-realistic images [FF 07] and optically
21 scans pictures of actual performers to create such images [FF 12]. The Appellant
22 appears to be arguing that applying geometric transformations to the image for
23 animation purposes negates the images being an image of an actual human being.
24 Nothing in claim 15 precludes post-processing of the actual human being image.
25 Indeed, if it did, it would be impossible to meet the limitations of claim 15,

1 because any representation of an image using finite resources, such as computer
2 memory, will inherently degrade the actual appearance of the subject. Therefore,
3 Rosenblatt's application of processing for animation does not negate the property
4 of the image being that of an actual human being.

5 *Claims 20-21*

6 The Appellants argue claims 20-21 as a group. Accordingly, we select claim
7 20 as representative of the group. Claim 20 requires presenting an image of a
8 virtual user receiving the beauty information. The Examiner found that Maloney
9 described the added image limitations and Rosenblatt described the virtual user
10 limitations (Answer 8). The Appellants contend that although Maloney describes
11 providing a customer with information and displaying an image of a customer,
12 Maloney does not describe an image of a virtual user receiving beauty information
13 (Br. 21:First ¶) and that Rosenblatt fails to show a virtual customer (Br. 21:Second
14 ¶). The Appellants also repeat the contention from claim 1 that replacing
15 Maloney's customer image with Rosenblatt's personal representative would make
16 Maloney unsuitable and that there was no motivation to combine the references.

17 We disagree. As to the last contentions, we find, as we did in claim 1, *supra*,
18 that no such substitution is suggested or proposed, and that Rosenblatt's virtual
19 representative suggests its usage in a customer support position such as Maloney's.
20 As to the virtual user, the Appellants admit (Br. 21:First full ¶) that Maloney
21 describes displaying virtual results in an image of a customer [FF 05]. We find
22 that Rosenblatt suggests animating an image of the computer user for the purpose
23 of interpersonal chat [FF 08] with Rosenblatt's virtual representative [FF07]. We
24 further find that one of ordinary skill would have found having multiple virtual
25 people, including a virtual representation of the user, present on a screen to be a

1 predictable use of Rosenblatt in view of Rosenblatt's application towards
2 chatrooms, PC gaming, and personal avatars [FF 13] all of which suggest visible
3 representation of interaction within the computer environment between the user
4 and another party and Rosenblatt's explicit portrayal of such an interaction
5 between multiple virtual people [FF 14].

6 *Claims 44-46*

7 The Appellants argue claims 44-46 as a group. Accordingly, we select claim
8 44 as representative of the group. Claim 44 requires automatically selecting an
9 image of the virtual beauty consultant based on characteristics of the subject. The
10 Examiner found that Maloney described the added limitations (Answer 9). The
11 Appellants contend that neither reference suggests automatically selecting an
12 image of a consultant (Br. 25).

13 We disagree. As the Appellants admit (Br. 25:First full ¶), Rosenblatt
14 describes selecting an image of the virtual beauty consultant (FF 10). Since the
15 user makes the selection, the user must be basing these selections on the
16 characteristics of importance to the user; it is the user's selection after all. The
17 only issue is whether doing so automatically would have been obvious.
18 Automation of a known manual step is generally obvious. *See Leapfrog*, 485 F.3d
19 at 1163. Maloney obtains psychological and physiological information of a
20 consumer and creates a personalized profile from the attitudinal and physiological
21 information with a customized user interface corresponding to the personalized
22 profile of the consumer. The interface includes customized information pages to
23 correlate the psychological and physiological information of the consumer [FF 02].
24 The use of such psychological and physiological information to create a
25 personalized profile with a customized user interface, where the interface would

1 include a virtual representative as suggested by Rosenblatt, would have suggested
2 using this information to automatically customize even the virtual representative
3 aspect of the interface.

4 *Claim 47*

5 Claim 47 requires presenting the image of the virtual beauty consultant in a
6 customizable environment. The Examiner found that Maloney described the added
7 limitations (Answer 9). The Appellants contend that neither reference describes
8 presenting in a customized environment (Br. 26:Bottom ¶ - 27:Top ¶).

9 We disagree. As the Appellants admit (Br. 26:Bottom ¶) Maloney describes
10 customizing the interface [FF 02]. Further, Rosenblatt describes its virtual
11 representatives in a variety of environments, such as instant messaging, chatrooms,
12 training, product support, human resources, supply chain software, ISPs, ASPs,
13 distance learning, bill presentment, and PC gaming [FF 13]. The claim makes no
14 limitation on the nature of the environment so customized. We find that the
15 combination of Maloney's customizable interface, of which Rosenblatt's virtual
16 representative would be a part, with Rosenblatt's selection of environments in
17 which to place virtual representatives would have suggested to one of ordinary
18 skill presenting the image of the virtual beauty consultant in a customizable
19 environment.

20 *Claim 48*

21 Claim 48 requires the personification of the subject receiving selected
22 information from the virtual beauty consultant and is thus essentially the same as
23 claim 20. The Examiner found that Maloney described the added limitations
24 (Answer 9). The Appellants repeated the arguments made for claim 20, and we
25 find that they are equally unpersuasive here for the same reasons we found, *supra*.

Claims 22-25 and 27-30

The Appellants argue claims 22-25 and 27-30 as a group.

Accordingly, we select claim 22 as representative of the group.

Claim 22 requires storing a series of beauty related queries in a data structure; establishing an interface enabling a subject to participate in an interactive beauty analysis; presenting to the subject a human image; and causing the human image to appear as audibly presenting to the subject at least one of the queries from the data structure.

The Examiner found that Maloney described all of the steps in claim 22 in providing beauty advice, but did not specifically apply them to a human image audibly resenting the information. To overcome this deficiency, the Examiner found that Rosenblatt described a human image audibly representing the information and implicitly found that one of ordinary skill would have known that such an audible image within Maloney's beauty advice environment would have provided beauty information, and concluded it would have been obvious to a person of ordinary skill in the art to have applied Rosenblatt to Maloney (Answer 5-6). The Appellants contend that neither Maloney nor Rosenblatt appears to audibly represent a query from a data structure (Br. 28:Bottom ¶ - 29:First full ¶).

We disagree. Rosenblatt specifically recites the application of its customer service as being applied to Frequently Asked Questions (FAQs), detailed instructions, and indexed and searchable help databases [FF 09]. We find that FAQs and help databases are databases that store queries typically presented by users [FF 09]. Since Rosenblatt audibly presents its information with the animated virtual representative [FF 11], and the information is contained in a data structure that contains queries typically made by users, Rosenblatt describes causing a

1 human image to appear as audibly presenting to the subject queries from a data
2 structure.

3 The Appellants also repeat the contention that there is no motivation to apply
4 Rosenblatt to Maloney, which we find unpersuasive for the same reasons we found
5 in claim 1, *supra*.

6 *Claim 26*

7 Claim 26 combines claims 22 and 15. The Appellants repeat the contentions
8 from those claims which we find unpersuasive for the same reasons we found
9 *supra*.

10 *Claims 31 and 32*

11 The Appellants argue claims 31 and 32 as a group. Accordingly, we select
12 claim 31 as representative of the group. Claim 31 combines claims 22 and 48. The
13 Appellants repeat the contentions from those claims which we find unpersuasive
14 for the same reasons we found *supra*.

15 *Claims 33-41*

16 The Appellants argue claims 33-41 as a group. Accordingly, we select claim
17 33 as representative of the group. Claim 33 is essentially the same as claim 22.
18 The Appellants repeat the contentions from claim 22 which we find unpersuasive
19 for the same reasons we found *supra*.

20 *Claims 42 and 43*

21 The Appellants argue claims 42 and 43 as a group. Accordingly, we select
22 claim 42 as representative of the group. Claim 42 requires a second human image
23 to appear to the subject through the terminal in a manner projecting an appearance
24 that the second human image answers a query.

1 The Examiner found that Rosenblatt described the added limitations (Answer
2 8). The Appellants contend that neither reference suggests the claimed second
3 human image (Br. 33:Second full ¶). We disagree. We found with respect to
4 claim 20 *supra* that Rosenblatt suggests presenting multiple virtual people in an
5 environment. We also found with respect to claim 22 *supra* that Rosenblatt
6 suggests presenting questions and answers. Thus, having a second person present
7 answers is no more than having each of Rosenblatt's separate virtual people
8 perform each of Rosenblatt's questions and answers. We find that having separate
9 virtual people raise and answer a question is a predictable representation of the real
10 world activity of two people performing the same.

11 The Appellants have not sustained their burden of showing that the Examiner
12 erred in rejecting claims 1-48 under 35 U.S.C. § 103(a) as unpatentable over
13 Maloney and Rosenblatt.

14 CONCLUSIONS OF LAW

15 The Appellants have not sustained their burden of showing that the Examiner
16 erred in rejecting claims 1-48 under 35 U.S.C. § 103(a) as unpatentable over the
17 prior art.

18 On this record, the Appellants are not entitled to a patent containing claims 1-
19 48.

20 DECISION

21 To summarize, our decision is as follows:

- 22 • The rejection of claims 1-48 under 35 U.S.C. § 103(a) as unpatentable over
23 Maloney and Rosenblatt is sustained.

